

Letter of Findings Number: 04-20130026
Sales Tax
For the Years 2009-2011

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ISSUE

I. Sales Tax—Exemptions.

Authority: IC § 6-2.5-3-7; IC § 6-2.5-8-8; IC § 6-8.1-5-1; Sales Tax Information Bulletin 55 (May 1989).

Taxpayer protests the Department's assessment of sales tax on sales to three customers.

STATEMENT OF FACTS

Taxpayer is a municipally-owned utility. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that it sold various utility services to customers without receiving proper exemption certificates from the customers. As a result, the Department assessed additional sales tax and interest. Taxpayer protested the assessment related to three customers. The Department conducted an administrative hearing and this Letter of Findings results. Additional facts will be supplied as necessary.

I. Sales Tax—Exemptions.

DISCUSSION

Taxpayer protests the assessment of additional sales tax on utilities sold to three customers.

Under IC § 6-8.1-5-1(c):

If the person has a surety bond guaranteeing payment of the tax for which the proposed assessment is made, the department shall furnish a copy of the proposed assessment to the surety. The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

IC § 6-2.5-8-8(a) provides:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase. (Emphasis added.)

IC § 6-2.5-3-7 provides in relevant part:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana. However, the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

For utility purchases by an end customer such as an individual or business, a Form ST-109 ("ST-109") must be issued by the entity claiming tax exemption. During the audit, Taxpayer did not provide copies of ST-109s related to various customers. However, subsequent to the hearing, Taxpayer provided multiple ST-109s for one customer. Taxpayer has provided information to conclude that the meter may have a different number than the one listed on the ST-109s due to replacement of the physical meter associated with the originally-issued ST-109s. Taxpayer's protest is sustained with regard to sales to that customer and which are attributable to the meters—including replacement meters—covered by the ST-109s.

Taxpayer also provided Form ST-105s for two customers; however, the customers provided the forms to Taxpayer in 1963 and 1971. While the Department generally acknowledges that taxpayers are entitled to rely on exemption certificates under IC § 6-2.5-8-8(a), the Department's current procedures for granting exemption certificates on utility purchases have been published since 1989. See Sales Tax Information Bulletin 55 (May 1989), 12 Ind. Reg. 2431. Since 1989, the Department's published guidance has provided that an ST-109 is necessary to purchase utilities without paying sales tax; alternative forms are not sufficient, even if the forms had been sufficient previously. Thus, Taxpayer's reliance on the 1963 and 1971 exemption certificates in this case is not persuasive.

Absent a proper exemption certificate, IC § 6-2.5-3-7 requires Taxpayer to produce evidence of nontaxability. Taxpayer has not provided sufficient factual ground to demonstrate that Taxpayer's utility sales were not subject to sales and use tax.

In the alternative, Taxpayer asserts that it could issue an exemption certificate to its customer and be relieved

of the duty to collect sales tax.

However, IC § 6-2.5-8-8 provides in relevant part:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

The language of subsection (a) provides that certain purchasers may issue exemption certificates to sellers. An exemption certificate cannot be properly issued by a seller–Taxpayer–to a purchaser–a customer. Thus, Taxpayer's alternative contention is unavailing.

FINDING

Taxpayer's protest is sustained with regard to the meters and customer for whom Taxpayer provided an ST-109. Taxpayer's protest is otherwise denied.

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